UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

CORNER INVESTMENT COMPANY, LLC
d/b/a THE CROMWELL

and **Cases 28-CA-209739**

ROBERT COVERT, an Individual

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Sara S. Demirok, Attorney
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Phone: (602) 416-4761
Fax: (602) 640-2178
E-mail: Sara.Demirok@nlrb.gov

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I. INTRODUCTION

Corner Investment Company, LLC d/b/a The Cromwell (Respondent) thought it had a cure for a "virus" spreading among its security officers. That virus, however, was an employee, Robert Covert (Covert), exercising his rights under the National Labor Relations Act (the Act) by discussing his working conditions with his coworkers and continually raising their concerns to his supervisors. In doing so, Covert challenged his commanding officers' decisions and highlighted safety issues stemming from a double standard in which Covert and other security officers had to pick up the slack of another officer.

Just after Covert's concerted activity grew and spread through September 2017,[1] Respondent tried to keep a lid on the virus by threatening Covert, disciplining him, and telling him not to discuss his discipline with other security officers. And when those actions did not contain the virus, Respondent chose the nuclear option: Respondent discharged Covert by seizing on a mistake that, apparently, no other security officers have been disciplined for before. However, Respondent's conduct runs afoul of workplace protections enshrined in the Act, and should, respectfully be remedied.

II. STATEMENT OF THE CASE

This case was heard before Associate Chief Administrative Law Judge Kenneth W. Chu (the ALJ) on July 17 and 18, 2018. The Complaint and Notice of Hearing (the Complaint) alleges that Respondent violated Section 8(a)(1) of the Act by threatening employees for engaging in protected activity, prohibiting employees from discussing their discipline, and

[1] Unless otherwise noted, all dates refer to 2017.

disciplining, suspending, and discharging employee Robert Covert (Covert) because he engaged in protected, concerted activity. GCX 1(e).[2]

III. ANALYSIS OF THE FACTS

A. Respondent's Operations

1. Respondent's Operations and Supervisory Hierarchy

Respondent operates The Cromwell, a hotel and casino located on the Las Vegas strip. Tr. 18. The Cromwell is one of several casino properties, including LINQ, the Flamingo, and Harrah's, affiliated with Caesars Entertainment. Tr. 22. Pertinent to this proceeding, Respondent employs a group of security officers who perform several functions at The Cromwell, including patrolling the property and maintaining various security posts in an effort to protect Respondent's property and serve Respondent's guests. They also assist with security matters that arise at the on-site nightclub, Drais Nightclub.[3] Tr. 155:6-12; 228:14-24.

The supervisory chain of command begins with a Security Corporal or Security Sergeant. From at least December 2016 through November 2017, Kristina Donathan (Donathan) was Respondent's Security Sergeant primarily working the swing shift. During that time, Donathan reported to Respondent's Security Captain, Russwood Roque (Roque). Tr. 18:21-20:2.

Captain Roque is responsible for overseeing Respondent's security operations, along with the security operations at The LINQ and The Flamingo. Tr. 45:5-22. His office is located at The Flamingo. Tr. 49:25-50:2. Captain Roque reports to the Assistant Director of Security, Dennis Easterday, who reports to the Director of Security, Eric Golebiewski. Tr. 20:3-12.

[2] GCX___ refers to General Counsel's Exhibit followed by the exhibit number; RX___ refers to Respondent's Exhibit followed by exhibit number; "Tr. _:___" refers to transcript page followed by line or lines of the transcript of the unfair labor practice hearing.

[3] Drais Nightclub employs its own group of security officers as well. Tr. 20:15-23.

2. Respondent's Security Officers

Respondent employs about 35 to 40 security officers who work at The Cromwell. Tr. 18:12-20. The security officers perform several different functions. At times, security officers are assigned to patrol the property. They are also assigned to certain rotating posts during each shift. For example, a security officer may be assigned to stand at one of the various entrances and then rotate to another post near the main elevators after a set duration of time. Further, security officers are sometimes assigned to patrol the property alongside police officers from the local police department (Metro), or work in dispatch. Tr. 29:1-30:2.

Newly hired security officers from The Cromwell and the other Caesar's Entertainment properties attend the Western Division Security Academy (the Academy). The Academy is overseen by Bobby Johnson (Johnson), who also heads up the security department at Harrah's. Security officers are instructed on Respondent's protocols related to apprehending and detaining suspects, among other things, at the Academy. Tr. 22:7-23:17; 169:14-22.

B. Covert's Employment History and Protected Activity

1. Overview of Covert's Employment History

Robert Covert (Covert) began working for Respondent as a security officer in April 2014. Tr. 155:2-6. Since at least 2016, Covert was also an instructor at the Academy. Tr. 51:2-16. According to Captain Roque, Covert was a strong officer, meaning that he worked hard, was great dealing with Respondent's guests, and was always willing to help out. Tr. 54-55. For the most part, Covert worked the swing shift, reporting to Sergeant Donathan. Tr. 155:13-156:22. However, as discussed more fully below, Respondent discharged Covert in early November 2017.

2. Covert Begins Discussing Concerns About Officer Behrens with Other Officers

Throughout 2017, Covert discussed several concerns related to a fellow security officer with his coworkers. After speaking with coworkers more frequently throughout August and September, Covert began raising these concerns directly to Sergeant Donathan and Captain Roque.

First, around New Year's Eve 2017, Covert had a conversation with fellow officer Juan Sarabia (Sarabia) about officer Michael Behrens (Behrens). On New Year's Eve, security officers were assigned 12-hour shifts and given a particular post for the whole duration of their shifts. The next day, Covert learned from Sarabia that Behrens walked off his post throughout the night without consequence from supervisors. Tr. 156:23-157:23. As Covert explained, this was concerning because the officers are assigned posts for a reason in that they are responsible for screening bags to ensure that items, such as weapons, are not brought on to the property. Tr. 157:24-158:4. Further, if one officer, like Behrens, is "out of that equation," it leaves more of a responsibility on the other officers. Tr. 158:5-10. Going forward, Covert continued to have concerns about Behrens leaving his post without consequence. Tr. 158:11-159:12.

Then, in mid-August 2017, Covert learned from Field Training Officer (FTO) Jason Lick (Lick), that Behrens was involved in an incident causing injury to Lick. Covert learned that Lick was attempting to detain a suspect when Behrens tackled Lick and the suspect to the ground. As Covert explained, Behrens' methods were not consistent with the proper force training taught at the Academy and presented another safety concern. Tr. 159:13-160:16.

Shortly after this incident, in mid-August, Covert began discussing his growing concerns about Behrens with fellow security officer, Raymond Bautista (Bautista) and FTO Lick, separately. Tr. 160:17-161:16. During his conversations with Bautista, Covert would raise the

issue of Behrens walking off post without consequence. They discussed how it was not fair and that they did not know why supervisors were not doing anything about it when everyone else was instructed to stay on their posts. Tr. 161:17-162:6. While less detailed, Bautista[4] corroborated Covert's testimony about their conversations and confirmed that he also noticed that Behrens left his post while on shift. Tr. 218:12-219:5; 222:25-224:21.

3. Covert Raises Concerted Complaint to Donathan

After discussing Behrens being allowed to walk off post with Bautista and FTO Lick, Covert decided to raise their concerns to Sergeant Donathan. As Covert explained, he thought that "somebody need[ed] to step forward and raise these issues to our supervisor." Tr. 162:10-15. So, in September, Covert first spoke with Donathan in her office. Tr. 163:21-24. Covert testified as follows.

Covert told Donathan that he wanted to speak with her about issues he was having with another officer. He continued to tell her about how Behrens was leaving his post which was creating a safety concern. He also explained that it appeared that there was a double standard with regard to what Behrens was allowed to do. Tr. 163:6-21. Covert followed up by telling Donathan that he was not the only security officer who was "seeing these things and who felt this way." Tr. 163:21-23. The conversation lasted about 10-15 minutes, and concluded with Donathan stating that she would talk with Behrens about it. Tr. 163:24-164:4.

After Covert spoke with Donathan, he continued to discuss Behrens with officer Bautista and FTO Lick. They discussed how they did not see anything change with regard to Behrens and that it was the same behavior day in and day out. So, Covert spoke with Donathan several more

[4] Bautista should be considered a current employee because at the time he testified, he worked at The Flamingo after being transferred from The Cromwell. Tr. 221:14-222:24. The ALJ should consider his employment status and that he testified against his own interests in assessing his credibility. *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995).

times throughout September. Tr. 164:5-20. Each time, Covert raised the same issues, telling her that if she had spoken with Behrens, his behavior had not changed. Covert also told her that it seemed like Behrens was "allowed to do what he wants, when he wants, while the rest of us still have to abide by being on post[.]" Tr. 165:7-20. According to Covert, he had about 5-10 conversations of this nature with Donathan throughout September. Tr. 164:21-165:4.

Donathan, although she did not deny that Covert raised issues to her about Behrens, described their conversations quite differently. According to Donathan, Covert came to her office on several occasions and simply told her that Behrens was lazy and did not do his job. Tr. 121:15-18; 246:25-5. After saying those few words, according to Donathan, Covert just left her office. Tr. 251:10-252:2.

The ALJ should credit Covert's testimony regarding his conversations with Donathan for the following reasons. First, Covert testified in a straightforward and forthright manner throughout his testimony. Although Respondent's counsel was provided a *Jencks* statement in furtherance of cross-examining Covert, not even the slightest inconsistencies were drawn out by the examination. Second, Donathan's testimony is implausible. For example, Donathan testified that it is her responsibility to make sure that the security officers are doing their job. Tr. 252:10-15. But, she would have the ALJ believe that she never followed up or asked for an explanation about Covert's complaint that Behrens was not doing his job. Tr. 151:23-252:15. In fact, even though Donathan testified that Covert came to her on several occasions, with concerns circling from Behrens being lazy to Behrens not doing his job (Tr. 121), she never thought to ask for more specifics. One would expect a supervisor responsible for the daily security operations of the business to follow up or gather more information about a repeated complaint that an officer

was derelict in his duties. At one point, when being confronted with this conundrum, Donathan let slip that she reported Covert's complaints to Roque. Tr. 252:2-8.

Further, the ALJ should discredit Donathan's testimony about the content of her conversations with Covert because Respondent failed to corroborate it. Donathan admitted that she reported what Covert told her to Captain Roque (Tr. 252), but Roque did not provide any testimony as to what Donathan reported to him. In fact, Roque was never asked by Respondent's counsel whether Donathan reported Covert's complaints about Behrens to him or what she may have told him about them. Rather, Respondent's counsel asked Roque whether Covert complained to him directly about Behrens and what the nature of the complaint was. Tr. 279:12-20. Thus, in light of Donathan's implausible and uncorroborated testimony, the ALJ should credit Covert's testimony about what he told Donathan during the various conversations they had about Behrens leaving his post without consequence when other officers had to abide by the rules, how Behrens' conduct presented a safety concern, and that other officers were also concerned about it.

4. Officers Start Grumbling About the Elevator Post

In the meantime, near the end of September, Respondent changed the duration of the security officer's post in front of the elevator. Tr. 177:4-5. Pursuant to Captain Roque's orders, the elevator post was extended to a four hour duration from two hours. Tr. 110-111; 175:3-176:24. After the change, Covert talked with other security officers on the shift about how taxing and unfair the longer duration was. As he described, standing in one spot was really uncomfortable. Tr. 175:3-176:16.

After the change, the duration of the elevator post was brought up at daily pre-shift meetings with Sergeant Donathan. During these meetings, officers, including Covert, requested

to have a podium or chair to use at the post. Tr. 111:13-18; 122:9-16. Covert also complained about the post change to Donathan who told him that there was nothing they could do about it because it was what Captain Roque wanted. Tr. 176:17-24.

Captain Roque admitted that there was some grumbling about the change, but was rather defensive when asked about whether most officers had a problem with his decision to change the duration of the post. Tr. 57:10-21. As discussed below, Roque apparently attributed the grumbling over his decision to Covert.

C. Respondent Issues a Final Written Warning to Covert

1. Respondent Issues Covert Discipline

On October 12, while Sergeant Donathan was on leave, Captain Roque issued a final written warning to Covert. On that day, Covert was called to Donathan's office, but met with Roque and Corporal Roland Meurtegui who was filling in for Donathan. According to Covert, he was first told to have a seat and shut the door. Then, Roque asked if he knew why he was there. Covert said no. Then, Roque said that he had had enough with the issues between Covert and Behrens and that he was sick of the "BS." Roque said he was tired of having to babysit the two of them and worrying about keeping them separated because they did not get along. Tr. 167:8-168:5.

Then, Covert explained to Roque the issues he was having with Behrens and told Roque that he had already raised his concerns with Donathan. Roque stated that if he did not have the complaints on paper, then it did not matter. Roque continued to explain that he had statements about Covert but did not have any statements about Behrens. Then, Roque told Covert to sign the written warning and he did. Before leaving the office, Roque told him to keep the discipline

to himself and that it was nobody else's business. Tr. 168:5-16. Finally, Roque told Covert to "just make sure you keep this to yourself." Tr. 168:16-17.

Captain Roque and Corporal Muertegui also testified about what was said during this meeting. Muertegui could not recall anything that was said, by anyone, during this meeting. Tr. 264-265. Captain Roque did not fare much better with regard to testifying about the content of the meeting. Roque could not recall anything that Covert said, although he said that Covert was "pretty upset." Tr. 288:17-22. When testifying about what he said during the meeting, Roque said that he told Covert that the feud between him and Behrens had to stop and that they were there to do a job. He also said that if Covert did not like anyone outside of work that was fine, but that at work, it has to be professional. Tr. 289:9-13. Then, after several leading prompts from Respondent's counsel, Roque testified that he did not recall if he said anything else during the meeting. Tr. 289:14-290:17. Based on the obvious deficiencies in Roque and Muertegui's testimony, the ALJ should credit Covert's more detailed recollection of what occurred during the October 12 meeting.

2. Respondent's Proffered Reason for Issuing the Discipline

According to Roque, he issued Covert the October 12 discipline based on two statements provided by other employees about a comment Covert made about Behrens. The statements suggest that Covert said that he would not care if Behrens dropped dead, among other things. Tr. 284:19-285:10; RX 6, RX 10. However, it is undisputed that Roque never questioned Covert about making the particular comments or even discussed with Covert what the basis for the discipline was aside from what is detailed above. Tr. 170:4-12. The disciplinary form does not mention the alleged comments either. See GCX 10.

On that same day, Roque also issued discipline to Behrens for "exhibiting the same type of behavior" as Covert. Tr. 291:11-23. However, the record is far from clear as to the actual basis for Behrens' discipline. When pressed on Behrens' conduct by CGC, Roque vaguely described that Behrens was not showing respect for a fellow officer. Then, when asked what he meant by that, Roque was evasive and returned to Covert's conduct. Tr. 302:12-303:2. Then, Roque appeared to dissemble in this exchange:

Q: No. I'm asking you about Michael Behrens's discipline.

A: Right. It's done -- same – it's the same thing.

Q: But I want to know what Michael Behrens did to get the discipline.

A: He was issued a discipline because he was still talking about Officer Covert. Prior to this incident, he was talking to another officer apparently.

Q: And as far as you know, what did Michael Behrens say about Mr. Covert?

A: I don't like him.

Q: That's what you learned? You learned that Michael Behrens said, I don't like Mr. Covert?

A: Yeah. That's my understanding of it.

Tr. 303:3-15. Although Roque later testified, in response to a leading question, that he was "summarizing" Behrens' statements about Covert, the record remains devoid of what Behrens actually did or said that lead to his discipline, which also colors the reason Respondent disciplined Covert if it was for the same behavior. Tr. 316:6-16. The ALJ should consider the forgoing when assessing Roque's credibility and considering the circumstances surrounding Covert's October 12 discipline.

D. Respondent Labels Covert a Virus and Problem Child

After receiving the discipline on October 12, Covert informed Captain Roque that he no longer wanted to be an instructor at the Academy.[5] Tr. 168:18-169:6. About this same time, Captain Roque spoke with Johnson, the head of Harrah's security department who manages the Academy, about Covert. Tr. 58:8-18; 169:2-10; GCX 9 at 2. According to Roque, he spoke with Johnson because he had noticed Covert's attitude change and thought that Johnson, whom he viewed as Covert's mentor, could get Covert "back on track." Tr. 54:3-16. Captain Roque explained that Covert had always been a strong officer, meaning that he was great with guests, willing to help out, and followed his commands. Tr. 54:16-55:11. But, Roque noticed a change, not in "the way [Covert] worked necessarily," but with his attitude. Tr. 55:12-15.

Just as Captain Roque requested, Johnson met with Covert about Captain Roque's concerns. When Covert met with Johnson, Johnson told him that his supervisors had labeled him as a "virus and a problem child." Tr. 170:21-171:3; 172:4-7; 173:21-6. Johnson explained that Covert's supervisors were concerned that he was complaining about posts and that he did not want to be an instructor anymore. After discussing what was going on with Covert, Johnson suggested that he speak with Captain Roque to smooth things over. Tr. 171:2-10.

After meeting with Johnson, Covert went to meet with Captain Roque at his office at The Flamingo. According to Covert, Captain Roque invited him in and asked him what was on his mind. Then, Covert explained that he had just met with Johnson and that Johnson had told him that he was being labeled a problem child and a virus on the swing shift. Covert told Roque that he could see things from his perspective because being as vocal about things was not conducive to the shift or the way that Roque wanted things run. Tr. 171:7-172:10.

[5] Captain Roque was equivocal on this point. When asked if he ever learned that Covert did not want to be an instructor, he answered, "I could have, not that I could definitively recall." Tr. 54:12-15.

Then, Roque agreed and explained that because Covert was a senior person and a training instructor, Respondent had higher expectations for him. Tr. 172:11-13. In response, Covert explained that this was the problem, that there were double standards. Tr. 172:13-16. Roque asked what he meant by that, and Covert explained that he was being held to a higher standard and other officers were being held to a "lesser or below that standard, which [was not] fair." Tr. 172:17-20. Then, Covert said, "That's what's causing animosity on the shift, is you're expecting everybody to operate on different standards and different levels versus everybody operating at the same standard at the same level." Tr. 172:20-23.

In response, Roque told Covert that he expected Covert to be the "go-to person" on the shift. Tr. 172:24-173:1. Roque went on to say that when he makes changes to the posts or if there are new rules implemented, Covert should "be more positive about them and support the supervisors, versus complaining about them to other officers." Tr. 173:1-5.

During this conversation, Covert also raised his issues with Behrens leaving his post without consequence as an example of the double standard. Roque just responded that if he did not have any written complaints, there was nothing he could do about it. Tr. 173:6-16. According to Covert, this meeting lasted almost an hour. Tr. 171:20-21.

Captain Roque also testified about what was said during this meeting. However, Roque's testimony was far less detailed than Covert's. Roque recalled that Covert told him that he was going to do better. He also recalled that he "kind of encouraged [Covert] to continue on" and that he wanted to see Covert "move up." After some probing, Roque testified that he could have said "something similar" to that he had high expectations of Covert. According to Roque, the meeting lasted "five minutes maybe." Tr. 58:24-60:17.

The ALJ should credit Covert's testimony about the duration and content of his meeting with Roque for the following reasons. First, Covert described in great detail what was said during this meeting in response to open-ended questions. Second, with regard to the content, Roque's testimony does not contradict Covert's testimony. Rather, Roque's vague description of what was said tends to corroborate Covert's version of events. Third, Covert's testimony is highly plausible and internally consistent with his testimony regarding his meeting with Johnson. Accordingly, as described above, the ALJ should credit Covert's testimony.

E. Respondent Suspends and Discharges Covert

1. Respondent Suspends Covert Pending Investigation

On November 2, Captain Roque suspended Covert, pending investigation, after he learned that Covert had not completed an incident report. On that day, at the outset of his shift, Covert attended a pre-shift briefing conducted by Donathan. During the meeting, Donathan told Covert that he had an outstanding report that he should complete right away (See Section III.F.1, below, for a more detailed discussion about the incident report). After the meeting ended, Covert went directly to the security office and completed the report. Covert informed Donathan once he had completed his portion of the report and then reported to work. Tr. 177:10-179:6; 181:19-182:1; 183:9-16.

Later that evening, Covert was summoned to Donathan's office. There, he met with Donathan and Roque. Roque told Covert that he was being suspended, pending investigation. Covert asked why he was getting suspended and Roque told him that he could not say. Roque further instructed Covert to contact human resources to discuss the reason. Covert left shortly after that. Tr. 183:17-185:2.

2. Respondent Discharges Covert

a. Respondent Accepts Captain Roque's Recommendation to Discharge Covert

Captain Roque referred Covert's suspension to the Human Resource Department with a recommendation to discharge him. Tr. 46:4-19. At that point, Respondent's Human Resource representatives, Angela Pfeifauf (Pfeifauf) and Karina Durante (Durante), conducted an investigation. Tr. 254:24-255:9.

During the investigation, Covert met with Pfeifauf and Durante on about November 6 for a due process meeting. During this meeting, Covert learned that he had been suspended because he had not filed the incident report on time. Durante, who was a trainee, questioned Covert about why he had not filed the incident report on the day of the incident or on the day he returned to work after the incident occurred. Covert explained that he had another high priority situation occur on the same night that his supervisor prioritized over the incident at issue. He also explained that he had forgotten about the report when he returned to work and that, although supervisors usually remind the security officers when there is an outstanding report, he was never reminded until November 2 when he was suspended. By all accounts, it was a brief meeting. Tr. 185-186; 259; RX 7.

Although Pfeifauf and Durante may have spoken with other individuals during the course of their investigation, it is unclear who they may have spoken with or what information they obtained throughout. Tr. 132:6-12. Regardless, Durante informed Roque and Donathan on November 8 that the investigation was complete instructed them to discharge Covert. RX 3.

The following day, on about November 9, Donathan called Covert and told him to bring in his uniforms. Covert asked if he was being let go, and Donathan confirmed that he was.

Shortly after, Covert went to Respondent's facility and returned his uniforms to Donathan.[6] While returning his uniforms, Donathan told Covert that he could appeal the discharge decision. Covert asked her what she thought his odds were of getting his job back. Tr. 186:12-187:14. In response, Donathan stated, "I honestly can't remember anybody ever being disciplined or fired for not completing a report on time." Tr. 187:14-17.

b. Respondent Holds Board of Review, Upholding the Discharge

Covert took Donathan's advice and appealed Respondent's decision to discharge him through its Board of Review process. The Board of Review was held on November 21. During the Board of Review, Captain Roque presented Respondent's reasons for discharging Covert and answered questions from a three member panel. Tr. 79:6-80:11; 88:14-89:21; 145:9-11; GCX 9. Ultimately, the Board of Review panel upheld Respondent's decision. Tr. 145:9-11.

Notably though, according to a near verbatim transcript of the process, Captain Roque provided the following information to the panel. Tr. 149:11-150:8. When asked whether he had "other documentation of officers not doing reports" with regard to discipline, Roque responded, in part, "yes officers do receive discipline."[7] GCX 9 at 1. Then, Roque averred to what appears to be other reasons for Covert's discharge. He mentioned how Covert's "discourteous behavior turned [him, i.e. Roque]" and how Covert "tries to be the boss." GCX 9 at 1. Roque also added that Covert had a "history of not treating employees well." GCX 9 at 2. Finally, Roque went on to tell the panel how he talked to Johnson about Covert's attitude and that even after Johnson spoke with Covert, he "didn't change." GCX 9 at 2.

[6] This testimony should be credited as it is undisputed. Donathan could not recall whether she informed Covert of Respondent's decision. Nor could she recall whether Covert returned his uniforms to her. Tr. 111:22-112:15. Further, Donathan testified that, in fact, she did not know of any other officer who had been suspended or discharged for failing to file a report, which tends to corroborate Covert's testimony. Tr. 120:13-16.

[7] As discussed below in Section III.F.4, evidence shows to the contrary.

F. Covert is the Only Employee Disciplined or Discharged for Failing to Timely File a Report

1. Details Surrounding the October 22 Incident Report at Issue

As discussed above, Respondent contends that Covert was discharged for failing to timely file an incident report. The incident underlying the report occurred on October 22. On that day, Covert was assigned to patrol the property with officers from Metro, the local police department. At approximately 1:45 a.m., Covert assisted the police officers in detaining two women who were reportedly being disorderly at Drais Nightclub. The two women were ultimately trespassed from the property, arrested by Metro, and transported to a correctional facility. Tr. 181; GCX 3.

Captain Roque emphasized during his testimony and to the Board of Review panel that Covert had "ample" time to complete the report related to this incident between 1:44 a.m. and when the incident reportedly ended at 4:00 a.m. Tr. 97:15-23; GCX 9 at 1. However, as the incident report shows, Covert spent that time notifying surveillance that the women were being moved to other areas of the facility; obtaining identification from the women; cross-checking their identities in Respondent's tracking system; obtaining permission and then reading the women a trespass warning; escorting Metro and the women to separate interview rooms; notifying supervisors that spit masks were required; and assisting Metro officers with getting the disorderly women to the transport vehicles. GCX 3 at 2. In sum, the report shows that Covert was highly involved in assisting the Metro officers and not simply sitting at a desk as Roque's statements suggest.

Then, right after this incident, Covert was called to assist with another arrest situation at Drais Nightclub. The incident involved an individual who was arrested for trying to get narcotics inside the nightclub. By the time Covert finished with this second incident, he had

been working for 16 hours. The on-duty Captain at the time, Dave Robbins, instructed Covert to complete the report related to the drug arrest and to clock out after, which he did. Tr. 181. Notably, Roque did not know who the on-duty supervisor was that night and never questioned anyone about whether Covert was instructed to complete certain reports that night. Tr. 63:21-65:15; 307:4-9.

Covert was not scheduled to work for the following day or two. Tr. 182:25-183:6; 258:15-18. Covert forgot about the outstanding report related to the trespass incident described above. The first time he was reminded to complete the report, on November 2, he immediately did so. Tr. 178:18-25; GCX 9 at 2.

2. Respondent's Incident Reporting System

Respondent uses a computer system, referred to as iTrak, to generate and maintain dispatch logs and incident reports. When an incident on Respondent's property is occurring, a dispatcher will create a dispatch log and draft real-time annotations related to the incident. The dispatcher may also "red flag" the dispatch log notes, marking the log as a high priority for better visibility. Then, the security officer who was involved in the incident will create an incident report detailing what happened. There is also a section on the report referred to as the "Executive Brief" where the security officer will include a summary of the incident. Tr. 99:15-101:16; 301:5-15

At the end of each shift, supervisors are responsible for reviewing the dispatch log notes to determine whether an incident report was created or completed by the security officer involved in the incident. Tr. 124:13-16 (Donathan responding to Respondent's counsel's question); see also Tr. 116:7-117:1. Then, if there is a missing incident report, Respondent

expects the supervisors to remind the officer to complete the reports. Tr. 63:12-20; 113-19; 116:7-17.

3. Respondent's Policy Related to Completing Incident Reports

During 2017, Respondent had no written policy related to when security officers need to complete incident reports. In an attempt to show that Respondent, in practice, has a policy requiring officers to complete reports within a certain amount of time, Captain Roque testified that Respondent "expect[s] the reports to get completed immediately[.]" Tr. 68:1-4. Roque also testified that depending on the circumstances, he would not necessarily issue discipline to a security officer for completing a report two days after the incident occurred. However, Roque testified that filing an incident report five or even 12 days after an incident occurred would warrant discipline. Tr. 67.

Later, when Roque testified on direct, he explained that the length of time a security officer has to complete a report depends on the discretion of the on-duty supervisor. Tr. 274:18-24. Roque further explained that in applying such discretion, a supervisor will consider the severity of the incident in determining whether a report needs to be completed immediately. Tr. 275:4-7. Roque gave the example of incidents involving arrests as high priority incidents that may require immediate reports. Tr. 275:8-14. Finally, Roque explained that when officers have reports to complete during their shift, a supervisor has to manage the staff, which will, at times, require the security officer to deal with further incidents preventing an officer the opportunity to complete the original report right away.[8] Tr. 276:24-277:7.

Respondent's other witnesses provided mixed testimony related to Respondent's policy on completing incident reports. For example, Respondent's current field training officer, Julian Begich (Begich), testified that security officers are expected to complete reports, generally, on

[8] This is actually what happened to Covert on October 22.

the same day as the incident. However, Begich explained that some low-priority reports, such as incidents "like a burnt-out light bulb," could go up to three days without a report. Tr. 237:13-19. The ALJ should give little weight to Begich's testimony. Although he was presented as a current employee, his testimony indicates supervisory indicia. Tr. 239-240 (Begich testifying that he provides security officers with Respondent's workplace policies and instructs them on how to behave with customers and fellow officers.) Moreover, Begich did not provide any testimony against his own pecuniary interests.

In sum, the record shows that there is no rule or policy dictating when an incident must be completed. At best, as Roque described, the time frame is governed by the on-duty supervisor's discretion.

4. Respondent Does Not Discipline Officers For Failing to File Reports

Contrary to Respondent's contention, other security officers have not been disciplined or discharged for failing to complete incident reports as Covert was. As Respondent's witness, Roque testified that Respondent has disciplined other security officers for failing to complete incident reports. Tr. 296:6-9. To further support his testimony on this point, Roque identified four disciplinary forms that he contended were issued because the "personnel" failed to complete a report. Tr. 296:10-16; RX 13. However, as the disciplinary forms show, three of the four disciplinary notices were issued to security supervisors, not security officers. RX 13 at 1,3, 4.

Rather stunningly, Roque's original testimony about the comparative discipline fell apart on cross-examination. First, Roque admitted that during the time frame when the "comparative" discipline was issued, in 2015, Respondent actually had a policy requiring incident reports to be completed within three to five days. Tr. 305:12-306:6; 309:25-310:2. Roque confirmed that the same policy was not effective in 2017. Tr. 306:5-6. And then, Roque plainly admitted that he

did not actually know the reason the disciplinary forms contained in Respondent's exhibit were issued in the following exchange:

> Q: Okay. And same goes for all of the other disciplines in Respondent's Exhibit Number 13, you don't know why those disciplines were issued, do you?
>
> A: No, I don't.

Tr. 311:11-19. Accordingly, the ALJ should give little to no weight in assessing Roque's testimony on this issue because he contradicted his own testimony. Furthermore, the ALJ should also consider this striking contradiction in assessing Roque's overall credibility on material issues.

The disciplinary forms are not self-explanatory either. For example, the discipline issued to supervisor Thomas Heath on October 14, 2015 appears to show that he was disciplined for "fail[ing] to properly address [a] safety issue with [an] employee[.]" RX 13 at 3. With regard to the discipline issued to supervisor Nikola Cicconi on December 15, 2015, it appears that the basis was at least in part for failing to report a found weapon to the local police department. RX 13 at 4. As another example, the form related to security officer Craig Ryan seems to indicate that that the employee engaged in some type of intentional behavior based on the policy violation cited ("employees will not intentionally obstruct surveillance system equipment") and also shows that the employee was not actually disciplined in accordance with Respondent's progressive discipline policy. RX 13 at 5 (showing that the record is only an "Informational Entry," rather than the first step of discipline, "Documented Coaching").

Accordingly, the ALJ should, respectfully, find that RX 13 does not contain examples of comparative discipline because: (1) Roque's testimony fails to establish such; (2) the forms were issued when Respondent had a different policy; (3) most of the forms were issued to supervisors,

not similarly situated security officers; (4) the only form issued to a security officer indicates that Respondent did not actually issue discipline; and (5) the basis for the disciplines is not clear from the content of the forms or Roque's testimony.

The only other evidence in the record suggesting that Respondent has disciplined employees for failing to complete reports came from Human Resource Manager Aisha Collins' (Collins) testimony. She testified that failing to complete an incident report is "generally a disciplinary incident." Tr. 132:20-133:1. However, Collins was unable to provide any examples of employees across Caesar's Entertainment properties that were actually disciplined for not completing an incident report. Tr. 134:11-135:1. The ALJ should find that this vague and non-descript testimony is insufficient to show that Respondent has similarly disciplined other employees.

On the other hand, the record clearly demonstrates that Respondent does not discipline employees for failing to complete incident reports within a certain time frame. Dozens of incident reports show that security officers have completed reports within time frames ranging from two to 22 days after the incidents occurred.[9] GCX 4; GCX 5, GCX 6, GCX 7, GCX 8, GCX 14(a) through (ddd). Sergeant Donathan also testified that when she learned that Covert had not completed the report, it was not the first time she had learned an officer had not completed a report. Tr. 113:13-19. If any of those officers had received discipline for not timely filing those reports, it would have been incumbent on Respondent to introduce such documentation, but it did not. Moreover, CGC subpoenaed documents showing "incidents in which Respondent investigated, suspended, disciplined, or discharged employees for failing to

[9] For example, CGX 14(rr) shows what appears to be a very similar incident to the incident in question here. The report shows that a security officer got called to Drais Nightclub to deal with a disorderly patron in possession of narcotics. Officer Roque was called to the scene for backup. Metro officers were also called to scene and gave the patron a trespass citation. The incident occurred on February 25, 2017, and the report was not created until ten days later, March 7.

complete an incident report since January 1, 2016[.]" Tr. 323:24-324:11. The only records Respondent produced were those included in RX 13, discussed above.

Additionally, security officer Bautista testified that he did not know of any employees, other than Covert, who were disciplined for failing to complete a report. Tr. 220:23-221:11. Accordingly, and for all of the reasons discussed herein, the ALJ should find that Respondent has not similarly disciplined other security officers for not timely filing incident reports.

IV. LEGAL ANALYIS

A. Roque's October 12 Statements Violate Section 8(a)(1) of the Act

1. Roque's October 12 Directive to Covert Not to Discuss His Discipline Was Unlawful

a. Legal Standard

The Board has historically applied a balancing framework in assessing whether directives to employees to keep discipline or disciplinary investigations confidential are unlawful. *Caesar's Palace*, 336 NLB 271, 272 (2001). Under that framework, the Board balances the impact of such directives on the "Section 7 right to discuss discipline or disciplinary investigations involving fellow employees" against "any legitimate and substantial business justifications" an employer advances for giving such directives. *Id.* Thus, in *Southern Bakeries, LLC*, the Board upheld an Administrative Law Judge's finding that an employer's directive to an employee not to discuss her last chance agreement with other employees was unlawful because, since the directive, given at the time of the issuance of the discipline, was not intended to protect any fact-finding process. 366 NLRB No. 78, slip op. at 1, 8 (2018), In contrast, in *Caesar's Palace*, the Board found an employer's imposition of a confidentiality rule during an investigation of alleged illegal drug activity in the workplace that involved allegations of a management coverup and possible retaliation to be lawful because the employer's interest in

protecting witnesses and preventing destruction or fabrication of evidence outweighed the rule's infringement on employees' Section 7 right to discuss the investigation. 366 NLRB at 272.

The Board recently modified the framework applied in assessing the lawfulness of employer rules generally, in *The Boeing Company*, 365 NLRB No. 154 (2017) (*Boeing*). However, it does not appear that this change will affect the Board's long-standing framework for analyzing whether directives not to discuss discipline or disciplinary investigations are unlawful. The Board cites *Caesar's Palace*, a seminal case on the issue, in support of its rationale in *Boeing*. *Id.* at slip op. at 5 n. 19. Further, the Board upheld an Administrative Law Judge's finding that a directive not to discuss discipline based on the *Caesar's Palace* framework in *Southern Bakeries, LLC,* 366 NLRB No. 78, slip op. at 1, 8. The Board has also continued to apply other balancing frameworks predating *Boeing* in other contexts. See *UPMC*, 366 NLRB No. 142, slip op. at 1-2 (2018) (off-duty access and distribution rules); *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 1-2 n. 4 (2018) (solicitation and distribution rules). Consistent with this practice of the Board, in Memorandum GC 18-04, "Guidance of Handbook Rules Post-*Boeing*" (2018) at 1-2, the General Counsel announced:

> Regions should also note that the Board in *Boeing* did not alter well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests. For instance, *Boeing* did not change the balancing test involved in assessing the legality of no-distribution, no-solicitation, or no-access rules. The decision similarly did not deal with the "special circumstances" test of apparel rules, although it may apply to aspects of apparel rules that are alleged to be unlawfully overbroad.

However, the General Counsel noted in the memorandum, issued after the issuance of the complaint in this case, that the Board's Division of Advice has not yet determined *Boeing*'s effect on rules regarding confidentiality of discipline. *Id.* at 2.

In any event, the two potential frameworks—*Caesar's Palace* and *Boeing*—are very similar, and arguably the same. As explained above, under the *Caesar's Palace* framework, the Board balances the impact of directives not to discuss discipline or disciplinary investigations on the "Section 7 right to discuss discipline or disciplinary investigations involving fellow employees" against "any legitimate and substantial business justifications" an employer advances for giving such directives. 336 NLRB at 272. Under the *Boeing* framework, the Board balances "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule." 365 NLRB No. 154 at slip op. at 3. Under either standard, Respondent's directive to Covert was unlawful.

b. Analysis

Here, during the October 12 meeting, Roque told Covert to keep his discipline to himself and that it was nobody else's business. This directive directly interfered with the recognized Covert's "Section 7 right to discuss discipline or disciplinary investigations involving fellow employees." *Caesar's Palace*, 336 NLB at 272. The impact of this directive on Covert's Section 7 rights is heightened by the fact that Covert tended to discuss concerns—such as his concerns about Behrens causing safety risks or Respondent applying a double standard—with other employees, and also by the fact that the discipline seemed to relate to some of these common concerns. In these circumstances, there was a substantial likelihood that Covert would actually want to discuss his discipline and the reasons for it with others for purposes of mutual aid and protection.

On the other side of the *Caesar's Palace* or *Boeing* balance, the directive could not have been intended to protect an ongoing investigation, since the discipline had already been decided upon and issued, and Respondent has presented no evidence that it intended to or did conduct

any further investigation. Further, although Respondent states in its opening statement that, even if such a statement was made, it was lawful because of Covert's threats and conduct throughout his employment (Tr. 14:2-5), Respondent did not present any evidence of conduct by Covert that would give Respondent reason to believe he would retaliate against others because of his discipline. Further, in issuing the discipline, Respondent did not give Covert any information that would enable him to identify employees whose statements or reports to Respondent might have resulted in his discipline. Even if it had presented evidence of a propensity to retaliate or an ability to identify Respondent's "informants," Respondent's blanket restriction on discussion of the discipline is in no way tailored to prevent retaliation. Had this been Respondent's intent, it could have instructed Covert not to threaten or retaliate against anyone because of his discipline. Instead, Respondent told Covert to keep *the discipline* to himself and that it (in context, *the discipline*) was nobody's business. Accordingly, the ALJ should find that Roque's directive violated the Act as alleged in Complaint paragraph 4(b)(1).

2. Roque's October 12 Warning That He Had Had "Enough" of "All the Issues" Between Covert and Behrens and That He Was "Tired" of "Having to Babysit" Them and Worrying About Keeping Them Separated Was Unlawful

a. Legal Standard

In determining whether an employer has implicitly threatened employees with negative consequences because of their protected activities, the Board applies an objective standard, under which it considers whether the employer's statements "reasonably tend[] to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." *Empire State Weeklies, Inc.*, 354 NLRB 815, 817 (2009). The Board considers the totality of the circumstances in

making this assessment. *Id.* It does not consider the employer's motivation or the statement's actual effect. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006).

b. Analysis

Here, during the October 12 meeting, Roque also told Covert that he had "had enough" with "all the issues" between Covert and Behrens and that he was "tired" of having to "babysit" the two of them and worrying about how to keep them separated. Roque never elaborated on what this meant. Under these circumstances, and in the context of Covert's recent concerted complaints about Behrens to Donathan (discussed more fully in the Section below), an employee in Covert's position would take Roque's comments as a warning that if he did not stop complaining about Behrens, there would be additional consequences. Specifically, Roque's statements that he had "had enough" and that he was "tired" conveyed that he had reached the end of his tolerance for Covert's protected activities, and, as a result, that a continuation of those activities would lead to some greater action to stop them, possibly even discharge. Accordingly, the ALJ should, respectfully, find that Roque threatened Covert with unspecified reprisals as alleged in Complaint paragraph 4(b)(2).

B. Respondent Violated Section 8(a)(1) of the Act by Disciplining, Suspending, and Discharging Covert

1. Legal Standard

In assessing whether an action has been taken against an employee for unlawful reasons or for other reasons cited by an employer, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that framework, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity

"contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Mgt.*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB at 1089.[10]

Evidence that may establish a discriminatory motive – *i.e.*, that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee – includes:

(1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB 363, 363 (2010) (unlawful motivation found where human resources director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities));

(2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat));

(3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card));

(4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, *passim* (2000), enfd. mem. 11 Fed. Appx.

[10] The *Wright Line* standard upheld in *Transportation Mgt.* and clarified in *Greenwich Colleries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 142-43 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the context of the Act, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or

(5) evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB 271 (2014); *ManorCare Health Services – Easton*, 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-57 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Mgt.*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id*.

2. Covert Engaged in Protected Concerted Activity

For an employee's activity to be "concerted," it must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). Even when a conversation involves only a speaker and a listener, it is concerted if it looks toward group action. *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987),

cert. denied 487 U.S. 1205 (1988), citing *Mushroom Transporation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).[11]

Concerted activities are for "mutual aid and protection" and therefore protected under Section 7, if they are aimed at seeking to improve employees' lot as employees. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-568 (1978); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962). Therefore, the Board has held that concerted complaints about unsafe working conditions or about preferential treatment or favoritism are protected under Section 7. *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 1 n. 1, 13 (2018) (safety); *North Carolina License Place Agency # 18*, 346 NLRB 293, 293 (2006) (favoritism), enfd. 243 Fed. Appx. 771 (4th Cir. 2007); *Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993) (preferential treatment), enfd. mem. 22 F.3d 303 (3d Cir. 1994); *James Walsh Construction Co.*, 284 NLRB 319, 321 (1987) (favoritism); *Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975) (safety), enfd. 544 F.2d 320 (7th Cir. 1976).

Applying these principles, the evidence establishes that Covert engaged in protected concerted activities. As discussed above, in about mid-August through September, Covert began regularly discussing growing concerns about Behrens leaving his post with fellow officers, including Bautista. They discussed the fact that Behrens had a habit of leaving his post, without permission, and without consequence whereas they were expected to remain at their posts. As Covert explained, this was a concern because security officers are responsible for ensuring that contraband and weapons do not enter the facility and when Behrens left his post, the

[11] Although the Supreme Court recently considered the scope of Section 7's protection and held that Section 7 of the Act does not give employees a procedural right to pursue class or collective actions relating to their terms and conditions of employment, the Court's dicta in that case clearly indicates continuing protection for workplace activities by employees aimed at improving terms and conditions of employment: "All of which suggests that the term 'other concerted activities' should, like the terms that precede it, serve to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, courtroom-bound 'activities' of class and joint litigation.'" *Epic Systems v. Lewis*, 138 NLRB 1612, 1625 (2018).

responsibility shifted to the other officers. Further, Covert was concerned because of the apparent double standard at play which was not fair to the rest of the officers.

After discussing these concerns with other officers, Covert took their concerns to Sergeant Donathan about five to ten times throughout September. Covert specifically told Donathan that he was not the only officer who was concerned that Behrens was leaving his post without consequence. Thus, Covert's complaints to Donathan were grounded in the concerns he spoke about with other officers and he communicated to Donathan that others shared his concerns. The fact that Covert brought the officers' concerns about Behrens to Donathan demonstrates that his earlier discussions with employees were a precursor to group action and that Covert did, in fact, initiate group action.

Similarly, Covert and other employees began complaining about the four hour elevator post in about late September. During pre-shift briefings with Donathan, employees, including Covert, requested to have a podium or chair available because standing in the same spot for hours on end was very uncomfortable. Thus, this was a shared concern among the officers and Covert raised the concern in a group setting on behalf of other officers. Again, the evidence firmly establishes that Covert initiated and participated in group action.

Accordingly, although, recently, the General Counsel has identified cases where only on employee has an immediate stake in the outcome of a concerted activity as a kind of case in which he may wish to advance alternative analysis to the Board, this case does not fall into that category. Memorandum GC 18-02, "Mandatory Submissions to Advice" at 2 (2017). The evidence does not establish that Covert was the only employee with an immediate stake in the outcome, and, to the contrary, establishes that other employees shared his concerns and were also affected by Behrens' conduct.

Respondent's assertion that Covert's complaints were not protected because "failing to get along with a coworker does not amount to Section 7 activity" (Tr. 12:7-10) is undermined by the clear evidence that Covert was not expressing bald dislike for Behrens, but was expressing common concerns about his conduct creating unsafe working conditions and the unfairness of Respondent's giving him preferential treatment. Similarly, Respondent's argument that Covert's complaints were not protected because they were "individual complaints about a coworker that lack any modicum of support from other employees" is belied by evidence establishing that: Covert told Respondent he discussed his concerns with other employees; Covert mentioned to Respondent that other employees shared his concerns; and, in fact, Respondent acknowledged it knew of Covert raising concerns about its changes to posts and rules to other officers when Roque admonished that he should support his supervisors and not complain to other officers. Moreover, even if , contrary to what the evidence shows, Covert's complaints to his coworkers lacked support, solicited employees do not have to agree with the solicitor or join in the solicitor's cause for the activity to be concerted. See *Mushroom Transportation*, 330 F.2d at 685; *Circle K Corp.*, 305 NLRB 932, 933 (1991).

Accordingly, the ALJ should find that Covert engaged in protected activity by discussing Respondent's double standard, Behrens' leaving his post, and the longer duration of the elevator post with other officers and to Donathan throughout September.

3. Respondent Knew About Covert's Protected Activity

The record is teeming with direct and circumstantial evidence that Roque, the decision maker in this case, knew about Covert's protected activity. First, Roque admitted that he knew that some security officers were complaining about the longer duration of the elevator post. And, Donathan admitted that she reported the issues that Covert raised with her about Behrens to Roque.

Second, Roque's veiled language tends to show that he knew Covert was complaining. For example, when Roque explained why he spoke with Johnson, he said it was to get Covert "back on track" because he noticed Covert's "attitude" change. Significantly, Roque clarified that his concerns about Covert did not stem from the way Covert was performing his job. This indicates that Roque was more concerned with, and knew about, what Covert may be saying, rather than doing.

Third, Johnson's statements to Covert show that Roque knew that Covert was complaining about the posts and other issues. Johnson specifically told Covert that his supervisors were concerned that he was complaining about posts. He also told Covert that his supervisors had labeled him a "problem child" and a "virus." Both of those labels strongly indicate that Respondent knew Covert was complaining to or with other security officers.

Respondent may argue that Johnson's statements are inadmissible hearsay.[12] However, the ALJ should find that Covert's testimony describing Johnson's statements, include non-hearsay opposing party statements under Rule 801(d)(2) of the Federal Rules of Evidence (FRE). First, the record supports a finding that Johnson, under FRE 801(d)(2)(A), was a representative of Respondent in that he is a high level official at Harrah's, operated under the same Caesar's Entertainment umbrella. The record also supports a finding that Johnson, under FRE 801(d)(2)(C), was authorized by Roque to make the statements to Covert. Roque's testimony supports this finding as it is clear that he approached Johnson because he thought Johnson was a good avenue to get Covert back on track. Thus, he authorized Johnson to broach the topic with Covert. Finally, the record also supports a finding under FRE 801(d)(2)(D) that Johnson is a party opponent as Johnson oversaw and managed the Academy in which Covert was an instructor and Respondent's officers attended. And, it was within the scope of that relationship

[12] There were no objections to any of this testimony from Respondent's counsel.

that Roque approached Johnson and Johnson spoke with Covert. In sum, there are several distinct and well-founded bases to consider Johnson a party opponent in the context of what he told Covert. Accordingly, the ALJ should find that testimony regarding what Johnson said include non-hearsay statements which should be relied upon to making a finding of knowledge, and animus as discussed below.

4. Respondent Harbored Animus Toward Covert's Protected Activity

As discussed below, there are several factors indicating that Respondent was unlawfully motivated in taking the adverse actions against Covert. Specifically, in relation to the October 12 written discipline, timing, contemporaneous unfair labor practices, and Respondent's apparent references to Covert's protected activity, show animus. Additionally, in relation to Covert's suspension and discharge, timing, disparate treatment, shifting reasons, and Roque's exaggerations and veiled language show animus.

a. Evidence Supporting a Finding of Animus Related to the October 12 Discipline

The record supports a finding of animus related to the October 12 written discipline issued to Covert. First, timing supports a finding of animus. Covert was disciplined within weeks of continually raising concerns with Donathan about Behrens and shortly after he and others started complaining about the elevator post. The close timing of these events raises suspicion that Respondent was reacting to Covert's protected activity.

Second, if Respondent was merely disciplining Covert for the alleged comment he made about Behrens' dropping dead,[13] one would expect Roque to address that comment with Covert. He never even questioned Covert about it or told him what comment was underlying the disciplinary action. Instead, Roque referred to Covert's "feud" with Behrens and the fact that he

[13] As discussed below, even if the evidence established that this one statement was the reason for Covert's discipline, Covert's alleged comment did not lose protection of the Act.

"expressed dislike" towards another officer. This strongly indicates that Roque was motivated, not just by the recent allegation lodged against Covert, but Covert's continued attempts to change the double standard Respondent was applying to the security officers by way of complaining about Behrens to supervisors and with his coworkers.

Third, Roque's coercive, contemporaneous statements during the disciplinary meeting support a finding of animus. *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 4 (2016) (finding that contemporaneous unfair labor practices shows animus). As discussed above, Roque prohibited Covert from discussing the discipline with anyone. And, Roque made clear that there would be further consequences if Covert did not back down from complaining about Behrens. These statements are independently violative of the Act and indicate that Roque was concerned with Covert having further discussions with his coworkers, which further supports a finding that Respondent was unlawfully motivated in issuing Covert discipline in first place.

Accordingly, the ALJ should find that CGC met her burden in showing that Respondent was harbored animus toward Covert's protected activity in deciding to issue him the October 12 discipline.

b. Evidence Supporting a Finding of Animus Related to the Covert's Suspension and Discharge

Respondent's animus in relation to Covert's suspension and discharge is glaring. As discussed below, evidence of disparate treatment, Roque's statements to the Board of Review panel regarding the reason for discharge, Roque's failure to substantively inquire about the circumstances, and Roque's veiled language, show that Respondent's proffered reason for discharging Covert amount to pretext, which strongly support a finding of animus.

i. Disparate Treatment Shows Animus and Pretext

Respondent's disparate treatment of Covert is highly indicative of Respondent's unlawful motivation. Respondent issued the final level of discipline – suspension, pending investigation – which directly led to his discharge because Covert failed to timely file an incident report. As discussed at length above in Section III.F.4, Respondent has not similarly disciplined employees. In fact, even though evidence shows that employees have engaged in similar "misconduct" in not filing reports the same day of the incident, or in some cases, within weeks, Respondent has not disciplined those employees like it did with Covert.

Respondent will likely argue that the untimely incident reports offered by CGC do not show similarly severe incidents, such as arrests, and thus there is no evidence of disparate treatment. However, there are two major flaws in Respondent's contention. First, Respondent wholly failed to show that it even has a policy dependent on the severity of the incident at issue. Rather, the policy proffered by Respondent is that the timeline for completing reports is dictated to a large degree by the discretion of the supervising officer. In Covert's situation, and undisputed by Respondent, Covert followed the direction given at the discretion of his supervisor the night of the incident. He was told to complete the subsequent report involving a drug bust, over the earlier incident at issue. Second, if Respondent had ever disciplined an employee for failing to file a report for a more severe incident (or any incident as Respondent's witnesses contended), it would be incumbent on Respondent to show that. Thus, the complete lack of records showing that Respondent has similarly disciplined other employees, supports, rather than undermines, a finding of disparate treatment. *Shamrock Foods Company*, 336 NLRB No. 107, slip op. at 1 n.1 (2018) (finding animus based on company's assertion that employees were disciplined for similar conduct, but "could not provide examples of such discipline").

ii. Roque's Lack of Inquiry Supports a Finding of Animus and Pretext

Roque decided to suspend Covert and recommended his discharge. However, Roque admittedly failed to inquire about the circumstances surrounding the incident or consider whether Covert's conduct was consistent with its policy, which supports a finding of animus and pretext. Although officers are ultimately responsible completing reports, as described by Roque himself, the timeliness of a report is at the discretion of a supervisor. In Covert's situation though, Roque never asked Covert or the supervising officer whether Covert was instructed to prioritize the completion of the report in any particular way or whether the supervisor instructed Covert to clock out before completing it. In fact, Roque did not even know who the supervising officer was. Had Roque made those inquiries into the situation, Roque would have determined that Covert had simply followed his supervisor's command, consistent with Respondent's policy.

Interestingly, Roque explained that the need for discretion on a supervisor's part in determining how to prioritize reports stems from the supervisors' need to manage the staff. Roque gave the fitting example of a supervisor having to pull an officer back onto the floor to deal with another ongoing incident as a situation where a supervisor may decide when a report does not need to be completed right away. However, before deciding to suspend Covert, Roque apparently made no inquiry into whether these circumstances were at play. Had he investigated in the slightest, Roque would have learned that Covert was pulled away from the incident at issue to deal with another incident.

In sum, Roque's failure to inquire about the surrounding circumstances tends to show animus and pretext as Roque simply seized the moment, regardless of whether Covert violated any company policy, to rid Respondent of a vocal complainer. *Midnight Rose Hotel & Casino*,

343 NLRB 1003, 1004-1005 (2004), enfd. 198 Fed. Appx. 752 (10th Cir. 2006) (finding that lack of substantive investigation supports a finding of animus).

iii. Roque's Comments to Johnson, the Panel, and to Covert Show Animus and Pretext

Roque's statements to the Board of Review panel shed light on his true, unlawful motivation for suspending and discharging Covert. As discussed above in Section III.E.2.b, Roque made several statements during the Board of Review process. Of note, Roque mentioned that after Covert received his final written warning, Covert's discourteous behavior turned toward him and that Covert would try to be the boss. Roque also mentioned that Covert had a history of not treating employees well. Not only do Roque's statements to the panel show that he was providing shifting reasons to the panel about why Covert had been discharged, but his statements strongly suggest that Roque wanted Covert gone for challenging how he ran the department (i.e., having a double standard and extending the elevator post) and having issues with other employees (i.e., Behrens leaving post). Providing shifting reasons for an adverse action supports a finding of animus. *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 6-7 (2014).

Moreover, Roque's statements to Johnson show that Roque was hostile towards Covert's complaints. In addressing Roque's concerns with Covert, Johnson told him that complaining about posts was an issue. And, in labeling Covert as "problem child and virus" it is evident that Roque was hostile towards and trying to further prevent Covert from complaining alongside other employees; He was concerned about Covert's complaints spreading, so to speak. In fact, Roque confirmed this when he later met with Covert and told him that he should be more positive about his supervisors' decisions instead of complaining to other officers. This strongly supports a finding of animus.

Furthermore, Roque informed the Board of Review panel of his attempt to quell Covert's "attitude" by way of Johnson, and also informed the panel that Covert's attitude did not change after. Apparently, by Roque's own account, he was still concerned about, and hostile towards, Covert's protected conduct that Johnson was unable to put to bed. Accordingly, the ALJ should find that Roque's various statements about Covert to Johnson and the panel put a spotlight on Respondent's hostility and true, unlawful motivation.

Accordingly, the ALJ should find that the GC met its burden in this case with regard to the October 12 discipline and Covert's suspension and discharge.

5. Respondent Failed to Meet Its Burden Under *Wright Line*

a. Respondent's Defense Related to the October 12 Discipline

Respondent has not met its burden in showing that it would have disciplined Covert on October 12 regardless of his protected activity. Respondent contends that it issued discipline to Covert because he told other employees that he would not care if Behrens dropped dead. However, as discussed above, the record shows that although Respondent produced statements saying Covert engaged in that conduct, Respondent did not identify that specific conduct to Covert as the reason for its discipline. Moreover, Respondent did not produce any contemporaneous documentation, such as an internal email, notes, or disciplinary records that identify that specific conduct as the reason for the discipline.[14]

[14] Even if Respondent had met its burden that Covert's comment about not caring if Behrens dropped dead, and not his other protected concerted complaints about Behrens, was the sole reason for his discipline, that comment, in the context of Covert's repeated discussions with his coworkers about Behrens and his efforts to raise concerns about Behrens with Respondent on behalf of the group, was protected, and it was not so egregious as to lose the protection of the Act. Where an employer asserts that it took action against an employee because of misconduct during the course of protected activity, the Board assesses whether the employee's conduct was so egregious as to lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). In determining whether conduct satisfies that standard, the Board weighs the following factors: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked in any way by an employer's unfair labor practices. *Id.* Applying the *Atlantic Steel* factors, there is no evidence that Covert's statement was made in a place where it would disrupt work or affect Respondent's ability to maintain discipline; the

b. Respondent's Defense Related to the Suspension and Discharge

Although Respondent contends that it had a legitimate, non-discriminatory reason for suspending and discharging Covert – that Covert failed to complete an incident report – it wholly failed in meeting its burden of proof. In view of the compelling evidence of disparate treatment and other indications that Respondents reason was steeped in pretense, Respondent is unable to show that it would have discharged Covert in absence of his protected activity. *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008).

6. To be Made Whole, Covert Should Be Compensated for Any Consequential Economic Harm He Has Incurred as a Result of Respondent's Unfair Labor Practices

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g., Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.),* 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all

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subject matter of Covert's comment was tied to his protected concerted complaints about Behrens creating unsafe working conditions and receiving preferential treatment; Covert did not use profanity or threaten violence, and the hypothetical nature of his comment makes it difficult to treat it as anything more than a hyperbolic and metaphorical remark; and, although Covert's comment was not provoked by an unfair labor practice, it was spontaneous, prompted by another employee calling Behrens' his "buddy" (likely an acknowledgement of employees' past discussions about their concerns about Behrens and Respondent's unequal treatment of him), and came in the wake of Respondent's failure to address Covert's repeated concerted complaints.

consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB 101, 102 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB 101, 104, 105 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability

incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8- 9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-293 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB 709, 719 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is

unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.[15] Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).[16]

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955)

[15] However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

[16] Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

(unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB at 719 (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a collective-bargaining agreement with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private

rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.[17] In *Nortech Waste*, *supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).[18]

[17] This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

[18] The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

V. CONCLUSION

Based on the foregoing reasons and record evidence considered as a whole, CGC respectfully requests that the ALJ find that Respondent violated the Act as alleged in the Complaint. CGC also urges the ALJ to issues an appropriate remedial recommendation, including a make-whole remedy, reinstatement, expungement of disciplinary records, and a notice to employees.

Proposed Notice to Employees
(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT prohibit you from discussing discipline that we have issued to you with others.

WE WILL NOT threaten you with discipline, suspension, or other reprisals for talking to other employees about concerns about employee conduct that may affect workplace safety, preferential treatment of employees, or other working conditions, or for acting together with other employees to raise such concerns with us.

WE WILL NOT discipline, suspend, or discharge you for talking to other employees about concerns about employee conduct that may affect workplace safety, preferential treatment of employees, or other working conditions, or for acting together with other employees to raise such concerns with us.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Robert Covert immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make employee Robert Covert whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses and compensation for any consequential economic harm resulting from his discharge.

WE WILL compensate Robert Covert for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL remove from our files all references to the discipline, suspension, and discharge of Robert Covert, and **WE WILL** notify him in writing that this has been done and that the discipline, suspension, and discharge will not be used against him in any way.

Corner Investment Company, LLC d/b/a
The Cromwell
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

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This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Case 28-CA-209739 was served by E-Gov, E-Filing, E-mail on this 24th day of August, 2018, on the following:

Via E-Gov, E-Filing:

The Honorable Kenneth W. Chu
Associate Chief Administrative Law Judge
National Labor Relations Board, Division of Judges
New York City Office
26 Federal Plaza, 17th Floor
New York, NY 10278

Via E-mail:

Brenda L. Rosales, Attorney at Law
Charles S. Birenbaum, Attorney at Law
Jonathan Sack, Attorney at Law
Greenberg Traurig, LLP
Four Embarcadero Center Suite 3000
San Francisco, CA 94111
Email: rosalesb@gtlaw.com
Email: birenbaumc@gtlaw.com
Email: sackj@gtlaw.com

Robert Covert
4033 Russian Rider Drive
Las Vegas, NV 89122-3445
Email: robertcovert03@gmail.com

Respectfully submitted,

/s/ Sara S. Demirok
Sara S. Demirok, Attorney
Counsel for the General Counsel
Phone: (602) 416-4761
Fax: (602) 640-2178
E-mail: Sara.Demirok@nlrb.gov